

1  
2  
3  
4  
5  
6  
7  
8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**  
10

11 SHAWN HAWK,

No. CIV S-04-0731-MCE-CMK-P

12 Plaintiff,

13 vs.

FINDINGS AND RECOMMENDATIONS

14 ALAMEIDA, et al.,

15 Defendants.  
16 \_\_\_\_\_/

17 Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant  
18 to 42 U.S.C. § 1983.

19 On June 23, 2006, the court directed the United States Marshal to serve process  
20 on defendant Howard. On September 18, 2006, the Marshal returned service unexecuted  
21 because defendant Howard is deceased. In light of the suggestion on the record of defendant  
22 Howard's death, on September 26, 1996, the court directed plaintiff to seek substitution pursuant  
23 to Federal Rule of Civil Procedure 25(a)(1) within 90 days of the date of the order. Plaintiff was  
24 cautioned that failure to seek substitution would result in dismissal of the action as against  
25 defendant Howard. More than 90 days have expired and plaintiff has not sought substitution.


26 ///

1 Federal Rule of Civil Procedure 25(a)(1) provides, in pertinent part: "Unless the  
2 motion for substitution is made not later than 90 days after the death is suggested upon the  
3 record by service of a statement of the fact of the death as provided herein . . . , the action shall  
4 be dismissed as to the deceased party." This language is mandatory in that dismissal is required  
5 where no timely motion for substitution is made. Because plaintiff has not sought substitution of  
6 defendant Howard within the 90-day period, dismissal of the action as against defendant Howard  
7 is required by the rules.

8 Based on the foregoing, the undersigned recommends that this action be  
9 dismissed as against defendant Howard only and that the Clerk of the Court be directed to  
10 terminate Howard as a defendant to this action.

11 These findings and recommendations are submitted to the United States District  
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 20 days  
13 after being served with these findings and recommendations, any party may file written  
14 objections with the court. The document should be captioned "Objections to Magistrate Judge's  
15 Findings and Recommendations." Failure to file objections within the specified time may waive  
16 the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17  
18 DATED: February 15, 2007.

19  
20   
21 **CRAIG M. KELLISON**  
22 UNITED STATES MAGISTRATE JUDGE  
23  
24  
25  
26